NANANG INTERNATIONAL SDN BHD

v.

THE CHINA PRESS BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-23-37-1996]
9 MARCH 1999

CIVIL PROCEDURE: *Res judicata - Issue estoppel - Action for libel - Plaintiff suing different defendants in separate actions - Actions based on identical pleadings - Whether res judicata - Whether second action tainted with issue estoppel - Narrow and wider construction of issue estoppel - Whether second action to be stayed*

The plaintiff had brought an action for libel against the defendant in respect of an article published by the defendant. By their pleading, the plaintiff averred that the article, in its natural and ordinary meaning, and by the innuendoes contained therein, had defamed them by way of 22 different explicit meanings. The facts showed, however, that, prior to the present suit against the defendant, the plaintiff had also filed a separate libel suit against three other defendants ('the S5 suit'), and had averred therein pleadings which were identical to the pleadings in the present suit. The S5 suit had since been dismissed by James Foong J and was pending appeal to the Court of Appeal. That being the case, the defendant contended that the present action was tainted with *res judicata* and ought to be stayed pending the outcome of the appeal in the S5 suit. The plaintiff argued that *res judicata* and issue estoppel could not apply as the defendants in the two suits were not of the same parties. An issue consequently arose as to whether the learned judge ought to hear the present suit or stay it pending the outcome of the appeal aforesaid.

Held:

[1] The plea of *res judicata* is divided into two distinct forms of estoppel, namely 'cause of action estoppel' and 'issue estoppel'. The cause of action estoppel prevents reassertion of a cause of action which has been determined in a final judgment by the same parties. Issue estoppel prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceedings. The court could raise the issue of *res judicata* and issue estoppel even if is not pleaded on grounds of public policy.

[2] The courts in appropriate cases have adopted either the narrow or wider construction of the doctrine of issue estoppel. The narrow construction is that the principles of issue estoppel would only be applicable when the parties or their privies to the proceedings to the earlier decision were the same persons as the parties or their privies to the proceedings in which the estoppel is raised. The wider construction of issue estoppel has been extended to preclude a party to a proceeding from re-litigating in a second proceeding identical issue of fact, law or mixed fact or law which have been determined against him in the earlier proceeding irrespective of whether the second proceeding involves different parties.

[3] In this case, the wider approach to a plea of issue estoppel ought to be preferred. This means that, where an issue had for all practical purposes been decided in a court of competent jurisdiction, the court would not allow the issue to be raised in separate proceedings between different parties arising out of identical facts and dependent on the same evidence, since not only was the party seeking to relitigate the issue prevented from doing so by issue estoppel but it would also be an abuse of process to allow the issue to be relitigated.

[3a] It follows that where the issue as to whether the articles published were defamatory of the plaintiff had been answered in the negative in the S5 suit, the plaintiff is estopped from arguing otherwise in respect of an identical article published, like in this case, in a different newspaper, which is the subject matter of a different action and involving a different defendant. The doctrine of issue estoppel operates to preclude to plaintiff from attempting to obtain a conflicting decision in respect of identical issues already determined against him in an earlier action.

[Application to stay action allowed.]

Case(s) referred to:
AMDB Factoring Sdn Bhd v. Iszajaya Sdn Bhd [1998] 1 CLJ Supp 159 ***(dist)***
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(aff)***
North West Water Ltd v. Binnie & Partners [1990] 3 All ER 547 ***(foll)***
Yat Tung Investment Company Ltd v. Dao Heng Bank Ltd & Anor [1975] AC 581 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, Sch, part 11

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 16, para 977

For the plaintiff - Mohan Krishnan; M/s Sri Ram & Co
For the defendant - Lorraine Cheah; M/s Shearn Delamore & Co

Reported by Farah Naim & WA Sharif

JUDGMENT

RK Nathan J:

Facts

The plaintiff filed this suit against the defendant in respect of an article published by the defendant alleging that the article concerned was defamatory of the plaintiff. The publication was headlined as follows:

> A DIRECT-SALE COMPANY IS INVESTIGATED AND BANNED FROM SUPPLYING GINSENG PRODUCTS

The subheading reads:

> TO INVESTIGATE APPLICATION OF PRESSURE

The direct sale company referred to in the said article was South-South International Sdn Bhd. In its statement of claim the plaintiff contended that the impugned article was however understood to refer to and concerned the plaintiff since the plaintiff was one of two companies which were raided by officers of the Ministry. It is also a fact that the plaintiff had in the present pleadings averred that the facts contained in the impugned article were widely known by readers of the Malay Mail, New Straits Times, Nanyang Siang Pau and China Press, who reside and work in and around the Klang Valley. In its pleadings the plaintiff averred that the said articles, in their natural and ordinary meaning and in the innuendoes contained therein, were understood to contain 22 different explicit meanings. For example, meaning no. (1) was "that the plaintiff was operating illegally"; meaning no. (10) was "that the plaintiff was marketing, selling or distributing the product after the expiry of their shelf-life"; meaning no. (20) was "that the plaintiff was not beyond using improper, illicit or underhanded tactics to undermine the investigations of the enforcement division of the Ministry or pervert the course of the said investigations into the plaintiff's business"; meaning no. (22) was "that the plaintiff, by reason of it not having obtained renewal of its direct selling licence, the usage of the outlawed pyramid system and all of the matters hereinabove complained of, was generally an irresponsible, unlawful and unreliable corporate citizen not worthy of any credit, recognition and standing". The plaintiff claimed damages for libel, an injunction and costs.

Earlier Suit No. S5-23-30-96 (The S5 Suit)

The plaintiff had also filed an earlier suit (the S5 suit) for defamation against three defendants, namely, a reporter of the Malay Mail, which is a publication of the 3rd defendant, The New Straits Times Press (Malaysia) Bhd, and the 2nd defendant being the Group Chief Editor. This suit alleged that the defendants had published several articles defamatory of the plaintiff. An article dated 22 April 1996 bore the headline "LICENCE NOT RENEWED" and alluded specifically to the plaintiff herein being "in trouble after Domestic Trade and Consumer Affairs Ministry found that it is operated even after its licence expired". A feature article dated 29 April 1996 was headlined "STOP SUPPLY ORDER" and bore a subheading "DIRECT-SELLING FIRM TOLD TO CEASE SUPPLY OF GINSENG PRODUCTS". Another article appearing in the New Straits Times on 26 April 1990 was headlined "REPORT ON HARASSMENT OF OFFICERS SURPRISES ABU HASSAN". Finally another article appearing in the Malay Mail on 21.5.96 was headlined "DIRECT-SELLING COMPANY WITH EXPIRED LICENCE" "PROBE INTO GINSENG FIRM DONE". It also bore a sub-headline "SEIZED RECORDS GIVEN TO HQ".

Again in its pleadings the plaintiff averred that the said articles in their natural and ordinary meaning and in the innuendoes contained therein were understood to contain the identical 22 different explicit meanings as set out in the present suit before me.

My learned brother, James Foong J, had on 9 October 1998 delivered a written judgment dismissing the plaintiff's claim.

The Issue

The issue before me was whether I ought to hear this suit or stay the action pending the outcome of the plaintiff's appeal to the Court of Appeal from the decision of James Foong J.

Findings Of The Court

Whilst I agree that the defendants in each of the two suits are different, the plaintiff cannot escape the conclusion that it had relied on the identical 22 explicit meanings that it has attributed to, to the articles appearing in both suits. Having read the articles fully I cannot but conclude that the various articles relied on by the plaintiff in respect of both suits arise out of the same complaints and that the articles refer to the same issues.

My learned brother, James Foong J, had in his written judgment summarised the 22 allegations into five issues and dealt with each of them exhaustively.

To my mind, since the plaintiff has repeated verbatim the identical 22 allegations in the suit before me, the plaintiff must therefore rely on the same evidence to back up the same allegations. Further the learned judge had made various findings of fact.

Part 11 of the Schedule to the Courts of Judicature Act 1964 states as follows:

> Power to dismiss or stay proceedings where the matter in question is *res judicata* between the parties, or where by reason of multiplicity of proceedings in any court or courts the proceedings ought not to be continued.

It grants this court the power to stay proceedings where the matter in question has already been decided by another court. The plea of issue estoppel represents an extension of the doctrine of *res judicata* to include a bar on subsequent litigation of all decided issues whose resolution was essential for the determination of the earlier proceedings. Therefore, the doctrine of issue estoppel means that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. The issue raised by the plaintiff is that in this suit the defendant is different and therefore the plaintiff argues that neither *res judicata* nor issue estoppel will apply against it. The then Supreme Court in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 very succinctly explained *res judicata* and issue estoppel. When a matter between two parties has been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the *res judicata*, as the judgment becomes the truth between such parties. An estoppel *per rem judicatum* has been created as a result. The Supreme Court explained that there are two kinds of estoppel *per rem judicatum*, that is, cause of action estoppel and issue estoppel. The cause of action estoppel prevents reassertion of a cause of action which has been determined in a final judgment by the same parties. On the other hand, the issue estoppel prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. Further, the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently. It also held that unlike an ordinary estoppel which should be pleaded, the court has the inherent jurisdiction to dismiss an action by applying the doctrine of *res judicata*, which is an estoppel based on public policy, even if it has not been pleaded, as public policy requires that there should be finality in litigation. It must be noted that the plaintiff had pleaded in this suit that the facts as contained in the impugned articles were "widely known by readers of the Malay Mail, New Straits Times, Nanyang Siang Pau and China Press, who reside and work in and around the Klang Valley". Since the plaintiff has attributed knowledge of the said facts to all the defendants in both suits, there

was no reason at all why the plaintiff could not have joined all the defendants in one suit. Alternately the plaintiff could have applied to consolidate this suit with the S5 suit so that the identical issues could have been disposed off at one and the same time.

The Narrow Construction

The extent of the boundaries of the doctrine of issue estoppel is by no means certain. There are decisions which have adopted a very narrow construction to the doctrine so that the plea of issue estoppel only applied when the parties or their privies to the earlier decision were the same persons as the parties or their privies to the proceedings in which the estoppel is raised. This narrow construction is based on the proposition that a judicial decision *inter partes* operates as an estoppel in favour of, and against parties and privies only and not third parties or strangers. This is illustrated vividly by referring to *Halsbury's Laws of England*, 4th edn, vol 16 para 977:

> A party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law.

The Wider Construction

Whilst there are cases that adopt the narrow construction of the doctrine of issue estoppel, it is obvious that there is no clear cut boundary to demarcate the narrow from the wider. The boundary is one defined with indelible ink; present yet pervasive. In appropriate cases, the courts have adopted the wider construction. The doctrine of issue estoppel has been given a wider construction and extended to preclude a party to a proceeding from re-litigating in a second proceeding identical issue of fact, law or mixed fact or law which have been determined against him in the earlier proceeding irrespective of whether the second proceeding involves different parties. This means that where the issue as to whether the articles published were defamatory of the plaintiff had been answered in the negative in the S5 suit, the plaintiff is estopped from arguing otherwise in respect of an identical article published, like in this case, in a different newspaper, which is the subject matter of a different action and involving a different defendant. The doctrine of issue estoppel operates to preclude the plaintiff from attempting to obtain a

conflicting decision in respect of identical issues already determined against him in the earlier action. This wider construction was applied by the Privy Council in *Yat Tung Investment Company Ltd v. Dao Heng Bank Ltd & Anor* [1975] AC 581. In that case, the bank sold a piece of property to the appellant which mortgaged the same property back to the bank. The appellant defaulted on the payment of interest under the mortgage and the bank exercising its rights of sale, sold the property to Choi Kee Ltd. The appellant brought an action (no. 969 of 1969) against the bank alleging that the bank's sale of property to the appellant in the first place was a sham and therefore a nullity and the bank counterclaimed for loss on re-sale to Choi Kee Ltd, denying the alleged nullity. The appellant failed in this action and the bank succeeded on the counterclaim. By a second action (no. 534 of 1972) the appellant sued the bank and Choi Kee Ltd on the grounds that the subsequent sale of the property by the bank to Choi Kee Ltd was fraudulent due to collusion between the respondents.

On an application by the bank and Choi Kee Ltd for an order that the statement of claim be struck out as being vexatious, frivolous and an abuse of the process of the court, the Supreme Court of Hong Kong ordered that the statement of claim be struck out. On appeal to the Privy Council, the court dismissed the appeal on the grounds of *res judicata* as the issues that the appellant were raising could have been raised and litigated in the earlier proceedings.

The Privy Council in the above-mentioned case applied the doctrine of *res judicata* to preclude the appellant from proceeding with the second suit against the bank and Choi Kee Ltd and raising issues which could have been litigated in the first suit despite the fact that Choi Kee Ltd was not a party to the first suit. Lord Kilbrandon observed at p. 589 of the judgment:

> The second question depends on the application of a doctrine of estoppel, namely *res judicata*. Their Lordships agree ... that the true doctrine in the narrower sense cannot be discerned in the present series of actions, since there has not been, in the decision in no. 969, any formal repudiation of the pleas raised by the appellant in no. 534. Nor was Choi Kee, a party to no. 534, a party to no. 969. But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.

Following the Privy Council decision in Yat Tung, Drake J held in *North West Water Ltd v. Binnie & Partners (a firm)* [1990] 3 All ER 547 that where an issue had for all practical purposes been decided in a court of competent jurisdiction the court would not allow the issue to be raised in separate

proceedings between different parties arising out of identical facts and dependent on the same evidence, since not only was the party seeking to relitigate the issue prevented from doing so by issue estoppel but it would also be an abuse of process to allow the issue to be relitigated.

I accept both the decisions as sound and adopt their reasoning. I hold that in this case before me, the wider approach to a plea of issue estoppel ought to be preferred. It is totally unrealistic to contend that just because the parties to the S5 suit and this suit are different the plea of issue estoppel will not apply especially when the two actions arise from identical issues, namely the 22 expressly pleaded innuendoes and where similar evidence would be relied upon.

In persuading me to hear this suit and to reject the plea of issue estoppel the plaintiff referred me to my own decision in *AMDB Factoring Sdn Bhd v. Iszajaya Sdn Bhd* [1998] 1 CLJ Supp 159; [1997] 5 MLJ 402 and urged me to adopt that decision wherein I had held that as the defendants were not the same in the two suits and as neither was once the privy of the other the issue of *res judicata* giving rise to an estoppel simply did not arise. What was referred to me was only half my finding. I had in that case also found that the causes of action in both the suits were separate and distinct and what is most important, I had in the *AMDB Factoring,* found that the issues in both suits were different and that therefore the issue of *res judicata* giving rise to an estoppel simply did not arise. The case before me has identical 22 issues in both suits.

I am therefore constrained to hold that the plea of issue estoppel has been correctly taken in this case by the defendant. I therefore allow the defendant's application that this suit be stayed until the outcome of the appeal to the Court of Appeal of the S5 suit. The defendant will have the costs of this application.